

# Freedom of Association in the Australian *Constitution* and the Crime of Consorting

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## Abstract

While the High Court's jurisprudence on the implied freedom of political communication has been well-developed in the past 20 years, there has been much less focus on the question of an implied freedom of political association, or a freedom to associate more generally. Cases that concerned association rights have been decided on other grounds. However, the recent re-introduction of consorting laws in New South Wales and Queensland, and the likely constitutional challenge to them, would require the High Court to directly address the question of the extent, if any, to which political association is protected by the Australian *Constitution*, and, perhaps, the continued workability of the distinction between communication and association that is 'political' (however defined), and communication and association that is not political. This article addresses the issue of the extent to which the Australian *Constitution* does and should protect an implied freedom of political association, or association more generally. It argues the New South Wales consorting provisions may be unacceptably broad, making no distinction between associations for sinister purposes, and associations for non-sinister purposes.

## I INTRODUCTION

The High Court of Australia's jurisprudence on the extent to which constitutional freedom of association rights exist remains in an underdeveloped state; the cases potentially concerning that freedom being decided on other grounds. This void becomes important given a recent move by the Parliament of New South Wales to update its criminal provisions dealing with consorting. This new provision (s 93X *Crimes Act 1900* (NSW)) and a recent move by the Queensland Parliament in October 2013 to criminalise association among members of twenty-six declared 'criminal organisations' (all motorcycle clubs) (s 60A *Criminal Code 1899* (Qld)) highlight the need for development of the law. These new provisions reflect a trend away from traditional criminal law

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approaches focussing on past behaviour and its consequences, and increasingly towards a policy of attempting to stop criminal behaviour before it occurs.<sup>1</sup> Walker writes that in a post-2001 world, no-one is sure who one's enemies are, so the net of those considered worthy of suspicion and investigation grows wider.<sup>2</sup>

These consorting laws implicate important human rights. In this article, I will focus on the freedom of association contemplated by the Australian *Constitution* and consider the extent to which such a freedom might be used to challenge anti-association legislation, using the consorting laws as an example. As we will see, the principles relating to freedom of association in Australia are limited to dicta by members of the High Court in some of the case law. The High Court has recognised for approximately 20 years that an implication of freedom of political communication can be deduced from the structure of the Constitution and its premise of representative democracy. Some judges have recognised that this freedom must necessarily include a right to associate. However, it has not been necessary in the case law on the implied freedom to date to consider this right to associate in great detail. Freedom of association has not formed the basis of any decision to date. However, this could change with a constitutional challenge to laws such as those which criminalise the very act of association. I will argue that by extension of existing Australian case law on the implied freedom of political communication, these laws are constitutionally vulnerable. I will use the recently enacted New South Wales laws as the prime exemplar, but make appropriate references to the laws in other jurisdictions as well.

The consideration of such issues in the Australian constitutional context would be assisted by a consideration of how similar issues have been dealt with in comparable jurisdictions; I will examine what can be drawn from the overseas authorities that have attempted to balance public safety concerns with freedom of association principles. I will argue that the High Court could draw support for its conclusion that the freedom of political communication implicates freedom of association from overseas case law, albeit developed in a different statutory and constitutional context.

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<sup>1</sup> Andrew Ashworth, 'Social Control and Anti-Social Behaviour: The Subversion of Human Rights' (2004) 120 *Law Quarterly Review* 263; Andrew Ashworth and Lucia Zedner 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law and Philosophy* 21.

<sup>2</sup> Clive Walker, 'Know Thine Enemy as Thyself: Discerning Friend from Foe Under Anti-Terrorism Laws' (2008) 32 *Melbourne University Law Review* 275, 276; Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Ben Gool and Liora Lazarus (eds), *Security and Human Rights* (Oxford, 2007).

In Part II of the article, I discuss the development of the implied freedom of association in Australian law. In Part III, I consider dimensions of such a freedom, including theoretical perspectives, and overseas perspectives. In Part IV, I outline the consorting provisions currently operative throughout Australia, before in Part V considering problematic aspects of the consorting laws in Australia if the High Court were to recognise the constitutionally implied freedom of association and the international learning. This analysis will assist in the development of the freedom of association jurisprudence in Australia.

## II FREEDOM OF ASSOCIATION IN AUSTRALIA<sup>3</sup>

In the early 1990s, the High Court of Australia recognised an implication from the system of representative government for which the *Constitution* provides.<sup>4</sup> The Court found that a necessary feature of the system of representative government contemplated by s 7 and s 24 of the Australian *Constitution* was an implied freedom of ‘political’ communication, so that individuals had broad freedom to discuss and hear opinions about political matters. This includes communication between electors and the elected, as well as between electors.<sup>5</sup>

Mason CJ, for instance, in *Australian Capital Television Pty Ltd v Commonwealth* (‘ACTV’)<sup>6</sup> stated that freedom of communication was indispensable to the ‘accountability and responsibility’ of representative government. Only by exercising such a freedom could the citizen communicate their views on the wide range of matters that may call for political action or decision.<sup>7</sup> The freedom was not absolute, but any law

<sup>3</sup> Some claim that the *Communist Party Case* (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1)) is an example of the High Court upholding freedom of association principles: *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 605 (Gleeson CJ, Gummow Hayne and Heydon JJ). Some care needs to be taken with this position, given the High Court found the legislation invalid in that case because of the lack of a head of power, rather than upon a more general human rights principle; see George Winterton, ‘The Significance of the *Communist Party Case*’ (1992) 18 *Melbourne University Law Review* 630. Dixon J did speak of the ‘right of association’ in that case (200); obviously he was not referring to a constitutional implication of the right of association, and this was not the basis of the decision of the court in that case.

<sup>4</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1. The term used was ‘representative government’ (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ), 168 (Deane and Toohey JJ), 228 (McHugh J) and/or ‘representative democracy’ 137 (Mason CJ) and 210 (Gaudron J)). It is not thought that there is a great substantive difference between the two concepts. For interesting commentary on the precise meaning of ‘democracy’ here, see Jeremy Kirk, ‘Constitutional Implications from Representative Democracy’ (1995) 23 *Federal Law Review* 37, 44–49.

<sup>5</sup> *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 556 (French CJ Gummow Hayne Crennan and Bell JJ).

<sup>6</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>7</sup> *Ibid* 138.

that derogated from that freedom had to be justified as being reasonably appropriate and adapted to a legitimate objective in a manner compatible with the constitutionally enshrined system of representative and responsible government.<sup>8</sup> The freedom was negative in nature, in terms of a freedom from interference, rather than a source of positive rights. It is not confined to the federal level,<sup>9</sup> and protects various types of communication, including non-verbal.<sup>10</sup>

In the *Lange* decision,<sup>11</sup> the High Court developed a two-stage test to determine the validity of laws challenged under the principles developed in *ACTV*:

- a) Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- b) If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner<sup>12</sup> which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

There is conjecture about the precise meaning of 'political' in this context.<sup>13</sup> The cases have shown that advertising during election campaigns is clearly a form of political communication,<sup>14</sup> as is discussion of public officials or public organisations,<sup>15</sup> protesting at duck hunting

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<sup>8</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The specific two-limb test was (a) does the law effectively burden freedom of communication about government or political matters either in terms, operation or effect, and if so (b) whether the law is reasonably appropriate and adapted to serve a legitimate end *in a manner which is* compatible with the maintenance of the constitutionally prescribed system of representative and responsible government; if the answer to the first was yes and the second no, the law would be invalid (567-568, Brennan CJ, Dawson Toohey Gaudron McHugh Gummow and Kirby JJ); the italicised words were substituted into the test by a majority in *Coleman v Power* (2004) 220 CLR 1.

<sup>9</sup> *Stephens v Western Australia Newspapers Ltd* (1994) 182 CLR 211; French CJ in *Hogan v Hinch* (2011) 243 CLR 506, [48].

<sup>10</sup> *Levy v State of Victoria* (1997) 189 CLR 579.

<sup>11</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-568 (Brennan CJ Dawson Toohey Gaudron McHugh Gummow and Kirby JJ).

<sup>12</sup> The italicised words were substituted into the two-limb test by a majority of the Court in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 77-78 (Gummow and Hayne JJ), 82 (Kirby J).

<sup>13</sup> In *Coleman v Power* (2004) 220 CLR 1, 30 Gleeson CJ noted the vagueness of the concept (the case involving an individual handing out pamphlets accusing a named police officer of being corrupt). The parties conceded in that case that such communication was 'political'; *Monis v The Queen* (2013) 295 ALR 259, [335] (Crennan Kiefel and Bell JJ).

<sup>14</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 1.

<sup>15</sup> *Nationwide News v Wills* (1992) 177 CLR 106.

season,<sup>16</sup> and religious speech.<sup>17</sup> Given that public allegations against a police officer have been considered to be ‘political’ communication,<sup>18</sup> as have anti-war letters sent to soldiers’ families,<sup>19</sup> it is submitted that a narrow view should not be taken of the meaning of ‘political’ here,<sup>20</sup> but its precise limits are unknown.

A distinction has been drawn between laws which directly interfere with freedom of communication about political matters, and laws which indirectly or incidentally impact on political communication.<sup>21</sup> Laws of the former category are more difficult to justify in terms of the second limb of the *Lange* test.

The Court will consider, in the balancing process involved at the second stage of the application of the *Lange* test, questions of proportionality,<sup>22</sup> and specifically whether there are less drastic means by which the legitimate objectives of the law could be achieved. The word ‘drastic’ in this context implicitly considers the impact of the law on fundamental human rights. The fact that means less invasive of fundamental human rights were/are available, but not adopted, may make it more likely that the more invasive path chosen by the legislature will be unconstitutional.<sup>23</sup>

While these comments directly concerned political communication, they may also apply to political association. Freedom of association is clearly contemplated by the implied freedom of ‘political’ communication. This

<sup>16</sup> *Levy v State of Victoria* (1997) 189 CLR 579.

<sup>17</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197 (conceded).

<sup>18</sup> *Coleman v Power* (2004) 189 CLR 579.

<sup>19</sup> *Monis v The Queen* (2013) 295 ALR 259.

<sup>20</sup> Recently in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, French CJ indicated a broad view should be taken of communications that are ‘political’ in nature: [67]. He made the same remark in *Hogan v Hinch* (2011) 243 CLR 506, [49], indicating there that it arguably included social and economic features of Australian society, given they were matters at least potentially within the purview of government.

<sup>21</sup> This distinction was first drawn in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ) and 235 (McHugh J) (similar to the distinction drawn in the United States literature between content-based and non content-based restrictions); see also *Hogan v Hinch* (2011) 243 CLR 506, 555 (Gummow Hayne Heydon Crennan Kiefel and Bell JJ); *Wotton v State of Queensland* (2012) 246 CLR 1, 16 (French CJ Gummow Hayne Crennan Kiefel and Bell JJ); *Monis v The Queen* (2013) 295 ALR 259, [64] (French CJ).

<sup>22</sup> *Monis v The Queen* (2013) 295 ALR 259, [282] (Crennan Kiefel and Bell JJ); Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 *Melbourne University Law Review* 1.

<sup>23</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, [206] (Crennan and Kiefel JJ) (if the alternative means are equally practicable); *Monis v The Queen* (2013) 295 ALR 259, [347] (Crennan, Kiefel and Bell JJ) (if the alternative means are ‘obvious and compelling’).

is because if the implied freedom of political communication includes the right of individuals to discuss issues, as the High Court said in *ACTV*, the individuals must discuss them with someone else. An association right is implicit. There is substantial academic support for such a suggestion.<sup>24</sup> George Williams has argued that freedom of association is fundamental to the system of representative government contemplated by ss 7 and 24 of the *Constitution*:

Freedom of speech and association have generally been an integral and accepted part of the process whereby the Australian people choose their representatives<sup>25</sup> ... it is difficult to see how some version of a freedom to associate could not be implied given the approach of the majority in *McGinty* and the existence of a freedom of political discussion. The ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people directly choose their representatives if denied the ability to form political associations? ... A freedom to associate for political purposes is likely to be a basic element of the system of representative government established by the *Constitution*.<sup>26</sup>

However, Australian judges have not had to decide whether such a freedom exists. In the leading Canadian case on freedom of association,<sup>27</sup> its links with democracy were noted. Dickson CJ and Wilson J described freedom of association as a fundamental freedom and an indispensable condition of any free and democratic society.<sup>28</sup> McIntyre J said freedom of association rights were the one human right clearly distinguishing a totalitarian state from a democratic one.<sup>29</sup>

On several occasions members of the High Court of Australia have referred to an apparent freedom of association as being part of or closely

<sup>24</sup> George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 194; Joo Cheong-Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations (2004) 27(2) *University of New South Wales Law Journal* 482, 495: 'the question whether a freedom of political association should be implied from the *Constitution* has yet to be settled by the High Court. Such an implication can be plausibly argued'; Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 38, 55: 'freedom of association may flow logically from free speech ... freedom of association is essential to representative democracy'; see also *Sweezy v New Hampshire* 354 US 234, 250 (1957) where four justices agreed that freedom of association was inherent in democracy.

<sup>25</sup> George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (2006) 20 *Melbourne University Law Review* 848, 856.

<sup>26</sup> *Ibid* 861.

<sup>27</sup> *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 S.C.R. 313, [22] (dissenting in the result).

<sup>28</sup> *Ibid* [22] (dissenting in the result).

<sup>29</sup> *Ibid* [154] (quoting Paul Cavalluzzo, 'Freedom of Association and the Right to Bargain Collectively' in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Carswell, 1986)).

related to the freedom of political communication. These include one of the two pioneering cases involving the implied freedom of political communication, *ACTV*,<sup>30</sup> where Gaudron J suggested that representative democracy which underpinned the *Constitution* might require freedom of association,<sup>31</sup> and McHugh J said that freedom of association was inherent in the requirements of s 7 and s24 of the *Constitution*.<sup>32</sup> Other judges in those cases quoted work of others in a way that might suggest they would be favourably disposed to an implication of freedom of association.<sup>33</sup> However, they did not expressly adopt such a freedom.

In *Mulholland v Australian Electoral Commission*,<sup>34</sup> Gummow and Hayne JJ conceded that freedom of association may 'to some degree be a corollary of the freedom of communication formulated in *Lange* and subsequent cases';<sup>35</sup> McHugh reiterated his agreement with the principle,<sup>36</sup> and Kirby J agreed with the principle.<sup>37</sup>

<sup>30</sup> (1992) 177 CLR 106; the sister case being *Nationwide News v Wills* (1992) 177 CLR 1.

<sup>31</sup> *ACTV*, 212; Gaudron J seemed to be suggesting the implied freedom of communication was not necessarily limited to the political context, stating that the 'notion of a free society governed in accordance with the principles of representative democracy may entail freedom of movement, freedom of association, and *perhaps, freedom of speech generally* (emphasis added). Mason CJ might have entertained a similar view, holding that freedom of communication was essential to representative government, 'at least in relation to public affairs and political discussion' (138) (emphasis added).

<sup>32</sup> *Ibid* 232; these judges reiterated their support for freedom of association in *Kruger v Commonwealth* (1997) 190 CLR 1, 115 ('freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others') (Gaudron J), and 142 ('the reasons that led to the drawing of the implication of freedom of communication lead me to the conclusion that the *Constitution* also necessarily implies that the people must be free from laws that prevent them from associating with other persons') (McHugh J). Toohey J also accepted the principle, finding that freedom of association was an 'essential ingredient of political communication' (91).

<sup>33</sup> In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, Mason CJ stated 'in truth, in a representative democracy, public participation in political discussion is a central element of the political process'. Then he said Archibald Cox made a similar point, quoting him in a passage referring expressly to freedom of association. It is considered to be a reasonable interpretation of this narrative that Mason CJ would have supported an implied freedom of association, at least for political purposes. In *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Deane and Toohey JJ noted that suppression of criticism of government or government officials removed an important safeguard on the claim of individuals to live peacefully and with dignity in an ordered and democratic society. Then they quoted Hughes CJ in *De Jonge v Oregon* 299 US 353, 365 (1936) who discussed the importance of free assembly in order to maintain free political discussion, so that government would be responsive to the people, and changes, if any, could be achieved peacefully. Hughes CJ said this was the essence of constitutional government. It is considered to be a reasonable interpretation of this narrative that Deane and Toohey JJ would have supported an implied freedom of association, at least for political purposes.

<sup>34</sup> (2004) 220 CLR 181.

<sup>35</sup> *Ibid* 234; Heydon J agreed (306).

<sup>36</sup> *Ibid* 225.

<sup>37</sup> *Ibid* 277; Gleeson CJ did not discuss the issue; Callinan J implicitly rejected the concept (297).

In a different line of cases, what I will call the ‘anti-association legislation’ line of cases,<sup>38</sup> similar sentiments are evident. For instance, in *South Australia v Totani*,<sup>39</sup> French CJ alludes to the fact that freedom of association has been suggested by other members of the High Court as an incident of the implied freedom of political communication,<sup>40</sup> and Hayne J refers to Act there as restricting a person’s freedom of association.<sup>41</sup> In *Wainohu v State of New South Wales*,<sup>42</sup> French CJ and Kiefel referred to the ‘implied freedom of political communication and freedom of association’,<sup>43</sup> while Gummow Hayne Crennan and Bell JJ simply repeated the comment of Gummow and Hayne JJ in *Mulholland* that the suggested freedom of association could only exist as a corollary to the implied freedom of political communication, and the same test of infringement and validity would apply.<sup>44</sup>

Discussion of freedom of association has also occurred in the context of terrorism laws which impact on association rights by criminalising membership of a terrorist organisation<sup>45</sup> and association with members of

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<sup>38</sup> Broadly, these cases are occasions where the Parliament has sought to criminalise the act of associating with others, for instance, being a member of an outlaw motorcycle club, or a member of a banned political party. The classic case where the High Court considered attempts to ban political organisations was of course *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, though the case was expressly decided on the basis that the law was not supported by s 51(6), rather than on any implication of freedom of association, *which was not recognised until 41 years later*. There is interesting conjecture regarding whether, if faced with similar legislation today, the Court would strike it down as an infringement of the implied freedom of political association: George Winterton, ‘The Communist Party Case’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003), 108, 133-134; Edward Santow and George Williams, ‘Terrorism Threat Assessments: Problems of Constitutional Law and Government Accountability’ (2012) 23 *Public Law Review* 33; Andrew Lynch, Nicola McGarrity and George Williams, ‘Lessons From the History of the Proscription of Terrorist and Other Organisations by the Australian Parliament’ (2009) 13 *Legal History* 25, 53: ‘criminalisation of membership per se is problematic both in principle and practice’.

<sup>39</sup> (2010) 242 CLR 1.

<sup>40</sup> *Ibid* 29, 54.

<sup>41</sup> *Ibid* 84.

<sup>42</sup> (2011) 243 CLR 181.

<sup>43</sup> *Ibid* 220.

<sup>44</sup> Heydon J agreed with this proposition: *ibid* 251. This suggestion, that an individual’s right to associate is a corollary of, and limited in the same way as, the implied freedom to communicate about government matters is in some ways similar to the second limb of the freedom of association right discussed by the United States Supreme Court in *Roberts, Acting Commissioner, Minnesota Department of Human Rights et al v United States Jaycees* 468 US 609 (1984). Others argue that the freedom of association should be seen as an individual right on its own, not derivative of the right to free speech: David Cole, ‘Hanging With the Wrong Crowd: Of Gangs, Terrorists and the Right of Association’ (1999) *Supreme Court Review* 203, 206.

<sup>45</sup> *Criminal Code 1995* (Cth) s 102.3 criminalises intentionally being a member of a terrorist organisation, knowing that it is such an organisation.



a terrorist organisation,<sup>46</sup> as well as providing for control orders<sup>47</sup> and preventive detention orders.<sup>48</sup> Concerns in that context have been raised mostly from academics,<sup>49</sup> rather than judges.<sup>50</sup> Further, most of those provisions contain tight restrictions on the circumstances in which they are applicable, minimising their potential incursion on the implied freedom of association and making it more likely that the Court would be likely to find them directed to a legitimate objective and in a manner compatible with representative and responsible government.<sup>51</sup>

<sup>46</sup> *Criminal Code 1995* (Cth) s 102.8 criminalises the act of an individual, on at least two occasions, intentionally associating with another who is a member of or promotes or directs the activities of a terrorism organisation, knowing that it is such an organisation, and intending the support to assist the organisation.

<sup>47</sup> Conditions on such orders can include specific restrictions on an individual associating with others (s 104.5(3)(e)), if this would substantially assist in the prevention of a terrorist act.

<sup>48</sup> *Criminal Code 1995* (Cth) s 105.4 (these would limit a person's ability to associate with others for a limited period).

<sup>49</sup> See, eg, Andrew Lynch, Nicola McGarrrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1, 17: 'the breadth of the definition of a terrorist organisation has the potential to infringe the freedoms of expression and association under international law and the Commonwealth *Constitution*'; Joo Cheong-Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations' (2004) 27(2) *University of New South Wales Law Journal* 482, David Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 1; Aidan Ricketts 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) *Southern Cross University Law Review* 133.

<sup>50</sup> In *Thomas v Mowbray* (2007) 233 CLR 307 for instance, where the High Court considered the validity of the control order provisions in the *Criminal Code 1995* (Cth) (Division 104), only Kirby J (dissenting) expressly considered their impact on the right to associate: 'clearly, the obligations, prohibitions and restrictions that might be imposed on an order made under s 104.4 of the *Code* will potentially infringe any, or all, of these rights' (referring to, amongst other rights, freedom of association) (440).

<sup>51</sup> For instance, the s 102.8 offence is confined to associations with members of a terrorist organisation where that association is intended to support or assist the organisation. Section 104 control orders are limited to occasions where the court is satisfied the order would substantially assist in preventing a terrorist act or where the person affected is reasonably believed to have provided or received training from a terrorist organisation. Preventive detention orders in s 105.4 are limited to occasions where the court is satisfied the person will engage in a terrorist act, has implements associated with a terrorist attack, is planning such acts, where their detention (for a limited period) would substantially assist in the prevention of a terrorist attack. These kinds of restrictions don't appear in an equivalent way in the consorting provisions. The United States Supreme Court recently upheld provisions criminalising the act of knowingly providing material support to a foreign terrorist organisation against a First and Fifth Amendment challenge: *Holder v Humanitarian Law Project* (2010) 130 S.Ct 2705. However, the Court was careful to note that they were only deciding that it was constitutionally valid to prohibit the act of providing material support to a foreign terrorist organisation; they specifically left open whether there would be a different answer if the legislation had criminalised speech or advocacy (2730), and found the legislation had no freedom of association implications (2730-2731) (Roberts CJ, Stevens, Scalia, Kennedy, Thomas and Alito; Breyer Ginsburg and Sotomayor JJ dissenting).

So, whilst there is numerous dicta (as well as influential academic authority) to the effect that some kind of freedom of association is protected by the Australian *Constitution*, it is just that – dicta. It has never been necessary to decide a case on the precise question of the freedom of association; the cases were decided on other bases – in the first category of cases, whether there was a breach of the implied freedom of political communication according to the *Lange* test as modified in *Coleman*.<sup>52</sup> This line of cases dealt with legislation concerning communication that was ‘political’ in nature in the broad sense of that word, for example advertising during election periods, and protests about matters of public interest.<sup>53</sup> The communication was made in public. They could be decided purely on the implied freedom of political communication.

The other line of cases dealing with anti-association legislation, cases like *Totani*, *Wainohu* and *Pompano*,<sup>54</sup> were not decided on the basis of possible infringement with the implied freedom of association, despite the fact that such laws clearly impacted such a freedom. Instead, on each occasion the court applied the *Kable* principle to these cases,<sup>55</sup> and asked whether a court was being conscripted in the implementation of an executive plan and/or being asked to act in a manner contrary to

<sup>52</sup> (2004) 220 CLR 1. See above n 8.

<sup>53</sup> Gaudron J suggested that the freedom of association may not be restricted to association for political purposes: ‘not every restriction on communication is a restriction on the communication of political ideas and information. On the other hand, any abridgement of the right to move in society and to associate with one’s fellow citizens necessarily restricts the opportunity to obtain and impart information and ideas with respect to political matters’ (*Kruger v Commonwealth* (1997) 190 CLR 1, 126-127).

<sup>54</sup> *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638.

<sup>55</sup> Essentially, the *Kable* principle is that a court established under the Australian Constitution cannot be given powers of such a nature that would undermine its independence, or create a perception that its independence was undermined. In other words, the court could not be asked to exercise power that was non-judicial in nature, or otherwise act in a way that would serve to undermine public confidence in the judiciary. This line of cases commenced with *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, where essentially legislation allowed a court to make an order that a particular offender (which the Act named) be retained in custody after the end of his allocated sentence, if the court was satisfied that it was more likely than not that the named individual would, if released, re-offend. The legislation directed that in making its decision, the court should give most emphasis to requirements of public safety, and normal rules of evidence did not apply. A majority of the High Court of Australia declared the legislation constitutionally invalid, impermissibly interfering with the independence of the court, conscripting it for the purpose of implementing an executive plan, and undermining public confidence in the judiciary. Since that case, the principle has been developed so as to strike down legislation requiring a court to make a control order against a member of a motorcycle club, once the Attorney-General had declared that club to be a proscribed organisation under state law. The court had no discretion not to make the order once the Attorney had made the declaration. A majority of the High Court declared the legislation to be unconstitutional, in breach of the *Kable* principle: *State of South Australia v Totani* (2010) 242 CLR 1.

traditional judicial process, such that the constitutionally mandated separation of powers, and public confidence in the independence of the judiciary, was being undermined.

This has left the Australian law in a partially developed state. While it seems that the Court accepts an implied freedom of association, it has not (yet) formed the basis of any decision, the Court has chosen not to apply the principle in recent cases which potentially directly enlivened consideration of the principle, preferring instead to decide on other grounds. Further, while some judges believe that any implied freedom of association is limited to the 'political' context (however defined), at least Mason CJ and Gaudron J in *ACTV* alluded to the possibility that the freedom might eventually be considered to be broader than 'political' discussion, and, to similar effect, recently French CJ has indicated a very broad interpretation of the meaning of 'political' in this context.<sup>56</sup>

An important question is whether an implied freedom of political association is needed, given the acceptance of the implied freedom of political communication. The author's position is that an implied freedom of political association is needed. This is because the consorting laws considered in this article directly criminalise association. They do not criminalise communication. As such, they directly raise the question of the extent to which pure association rights are protected by the *Constitution*. Given these laws criminalise association; they are best countered with arguments concerning a possible implied freedom of political association, rather than the implied freedom of political communication. Having said this, it must be acknowledged that there is unlikely to be a major difference between the operation of the concepts of political communication and political association. The purpose of association is communication. It is anticipated that just like with the implied freedom of political communication, the two-step *Lange* approach would be taken. Paraphrasing the *Lange* test, the first question would be whether the law effectively burdened freedom of *association* with respect to government or political matters in terms, operation or effect. The second would be whether, if the law did so, it was reasonably appropriate and adapted to a legitimate end in a manner compatible with representative and responsible government.

The argument that the consorting laws could be challenged on the basis that they infringe the implied freedom of political communication is readily accepted, and the author expects that in many, if not all, cases the

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<sup>56</sup> *Hogan v Hinch* (2011) 243 CLR 506, [49] (French CJ) suggested that the political arguably includes social and economic features of Australian society, because they were matters at least potentially within the purview of government; *Monis*, [67]; *Adelaide*, [67]: 'the class of communication protected by the implied freedom in practical terms is wide', in the course of finding that religious speeches could fall within the protection of the freedom.

result would be the same, regardless of whether the implied freedom of political communication, or an implied freedom of political association, is considered. However, it would be intellectually more coherent and logical to consider them through the prism of an implied freedom of political association, given that they literally criminalise association. It is noteworthy that it is not only this author that sees value in protecting freedom of association quite separately from freedom of expression more generally. This is clear in human rights instruments such as the *European Convention on Human Rights*, *International Covenant on Civil and Political Rights* and *Universal Declaration of Human Rights*, all of which expressly protect freedom of association in a separate article from freedom of expression.<sup>57</sup> Those who drafted such instruments obviously believed that it was better to protect freedom of association directly and expressly, rather than indirectly and implicitly through the freedom of expression path.

As well as being, in the author's view, more intellectually coherent to consider a law criminalising association in the context of freedom of association, there is also a practical benefit to doing so, rather than through the implied freedom of political communication. This is because the High Court, in its implied political communication jurisprudence, has itself drawn a distinction between laws which directly interfere with freedom of political communication, and laws which indirectly do so. Laws of the former category are more difficult to justify.

Consider a law that directly criminalises political association under the above principles. According to the High Court, this law only *indirectly* interferes with political communication. It does not do so in its direct terms, but may have this consequential effect. As such, it is easier for the government to justify under existing principles, according to the Court. Yet, it is submitted that a law directly criminalising political association is a law that directly attacks the heart of representative and responsible government for which the Constitution provides, so should instead be very difficult to justify, not easier to justify as the current jurisprudence would conclude. In the author's view, this demonstrates the practical utility of recognising an implied freedom of political association, apart from (but of course closely linked with) the implied freedom of political communication.

In a situation where the Australian case law is underdeveloped, it is considered instructive to consider other perspectives, to provide possible

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<sup>57</sup> *European Convention on Human Rights* – freedom of expression is protected in art 10(1), freedom of association in art 11, *International Covenant on Civil and Political Rights* – freedom of expression is protected in art 19(2), freedom of association in art 21, and the *Universal Declaration of Human Rights* – freedom of expression in art 19, freedom of association in art 20.

direction for development of the freedom. The article will now consider the extent to which theoretical and international perspectives can assist in the articulation of the suggested freedom of association, and its application to the consorting laws.

### III FURTHER DIMENSIONS OF THE FREEDOM OF ASSOCIATION

#### A *Philosophical Underpinnings of the Freedom*

While freedom of association remains an underdeveloped area of Australian law, there is strong theoretical support for the existence of such a right. Leading writer on democracy Alexis De Tocqueville viewed freedom of association as one of the fundamental rights:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost an inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society ...<sup>58</sup> amongst democratic nations ... all the citizens are independent and feeble; they can do hardly anything by themselves, and none of them can oblige his fellow-men to lend him their assistance. They all, therefore, become powerless, if they do not learn voluntarily to help each other. If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy ...<sup>59</sup> feelings and opinions are recruited, the heart is enlarged, and the human mind is developed, only by the reciprocal influence of men upon each other.<sup>60</sup>

The centrality of association with others in terms of an individual's self-development and identity has been noted.<sup>61</sup> As Mill puts it:

Why is it, then, there is on the whole a preponderance among mankind of rational opinions and rational conduct? If there really is this

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<sup>58</sup> Alexis De Tocqueville, *Democracy in America* (Richard Heffner translated and edited, 1956) 98; 'the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances' (*United States v Cruikshank et al* 92 US 542, 552 (1876)).

<sup>59</sup> *Ibid* 199.

<sup>60</sup> *Ibid* 200. See also T Emerson, 'Freedom of Association and Freedom of Expression' (1964) 74 *Yale Law Journal* 1, 1: 'the individual, in order to realise his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives'; 'as social beings, our freedom to act with others is a primary condition of community life, human progress and civilised society' (Dickson CJ (dissenting) in *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 S.C.R 313, [86].

<sup>61</sup> George Kateb, 'The Value of Association' in Amy Gutmann ed, *Freedom of Association* (1998) 48; Isaiah Berlin 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) 131; Liat Levanon, 'Criminal Prohibitions on Membership in Terrorist Organisations' (2012) 15 *New Criminal Law Review* 224, 268.

preponderance ... it is owing to a quality of the human mind, the source of everything respectable in a man either as an intellectual or as a moral being; namely that his errors are corrigible. He is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning ... the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this.<sup>62</sup>

Further, if we accept the 'social contract' doctrine that members of a society unite together in order to better protect their rights and interests, delegating some right and powers to a government, it is hard to square this with laws criminalising association not proven to have criminal overtones. As Rousseau himself noted, government's powers over subjects do not go beyond the boundaries of 'public utility'; he quoted d'Argenson that 'everyone is perfectly free to do what does not injure others'. Rousseau calls that the 'invariable boundary'.<sup>63</sup> It is hard to see that associating with other people, without more, injures others.

These learned thinkers reflect the fundamental importance to a democracy and to a society generally, of the ability of individuals to associate with others. As individuals whose ideas underpin western democratic principles, their ideas about the importance of the freedom of association must be borne in mind. These theoretical perspectives tend to reiterate in the author's mind that no narrow or pedantic view should be taken of such a fundamental freedom. When we weigh up the validity of laws affecting that freedom, we must remember the weight and importance that is rightly given to the ability of individuals to congregate and communicate as they see fit. International human rights instruments reflect principles of freedom of association rights.<sup>64</sup> It is not considered radical to suggest that a democratic nation such as Australia should protect a fundamental freedom such as the right to association. It would be artificial to protect freedom of political communication, but not

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<sup>62</sup> John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* (Everyman, 1972) 88. See also Isaiah Berlin who develops the idea of affirmative self-development: 'Two Concepts of Liberty' in *Four Essays on Liberty* (1969) 131.

<sup>63</sup> Jean-Jacques Rousseau, *The Social Contract* (Penguin Books, 1968) 165.

<sup>64</sup> *International Covenant on Civil and Political Rights* (arts 21 and 22), *European Convention on Human Rights* (art 11(1)), and the *Universal Declaration of Human Rights* (art 20), *Canadian Charter of Rights and Freedoms* (art 2(f)), *New Zealand Bill of Rights Act 1990* s 17.

freedom of political association. It is necessary to associate to communicate.

Further, the above authors make no distinction between speech or association that is ‘political’, and speech or association that is not. Arguably, nor should the Australian courts, particularly given the difficulty of discerning what counts as ‘political’ in this context and what does not, and the practical question, that communication often involves a mixture of what might be called ‘political’ communication and what might be called non-political communication, making practical enforcement of laws that target the non-political speech aspect, but which defer to the constitutional freedom in the political speech aspect, very problematic. This issue will be discussed in more detail later.

### B *United States Experience*

It is considered instructive to consider the rich jurisprudence from the United States on the right to free speech. That country is the leading democracy in the world, and links between freedom of association and democracy have just been noted. If the High Court were to recognise an implied freedom of association, it might be helpful, in considering the appropriate balance between freedom of speech and the need for community safety from potentially harmful associations, to consider that country’s experience. As always, textual differences must be noted – the American right is an express one enshrined in the *Bill of Rights*, the Australian freedom (if a freedom of association were to be recognised by the Australian High Court) would be implied from our *Constitution*. The American right is a positive right, founding actions for breach of it, whereas the Australian freedom would be a negative freedom, in the sense of a protection from interference, rather than a positive right. On the other hand, in the United States, as in Australia, the right (freedom) has not been considered to be absolute. Limitations on the right/freedom may be constitutionally justifiable, if narrowly drawn, and a balancing of competing interests is implicit. The extent of the interference with the right, questions of proportionality, the availability of means less invasive to achieve the legitimate end, and the strength of the government justification for the intrusion are all important. It is useful to see how this balancing has occurred in other democracies.

There should not be an objection to considering *First Amendment* case law in respect of the implied freedom of political communication and association. This point is necessary in light of the claim by three High Court judges in *Monis v The Queen* that ‘there is little to be gained (in considering the Australian implied freedom) by recourse to jurisprudence concerning the First Amendment’.<sup>65</sup> It can fairly be said that High Court

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<sup>65</sup> *Monis v The Queen* (2013) 295 ALR 259, [326] (Crennan Kiefel and Bell JJ).

judges have differed on the relevance of American constitutional principles to interpretation of the Australian *Constitution*. The relevance of the American principles to Australia has been recognised at the macro level,<sup>66</sup> in the sense of their relevance to our *Constitution* generally, as well as at the micro level on the precise issue of the interpretation of the implied freedom of political communication, where there are numerous references to, and use of, American First Amendment case law and principles in the course of developing Australian jurisprudence in this area.<sup>67</sup> As a result, and despite some clear reservations about the use of

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<sup>66</sup> Sir Owen Dixon noted that the Australian founding fathers 'followed with remarkable fidelity the model of the American instrument of government' and referred to differences between the Australian and American models as being 'intangible': *Jesting Pilate* (1965) 102, 104. Examples include the fundamental reasonably appropriate and adapted test of the constitutionality of a law (*McCullough v Maryland* (1819) 4 Wheat 316, 321 (Marshall CJ), applied in cases like *Commonwealth v Tasmania* (1983) 158 CLR 1; in the context of interpreting s 80 of the Australian *Constitution* ('one would expect that it was the intention of the framers of our Constitution to carry over into s 80 any settled interpretation of the words of that central command in the United States provision' (*Cheatle v The Queen* (1993) 177 CLR 541, 556); s 92 (*Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318); s51(31) (*Andrews v Howell* (1941) 65 CLR 255, 282: 'the source of s 51(31) is to be found in the Fifth Amendment of the Constitution of the United States' (Dixon J); Winterton, Lee, Glass and Thomson, *Australian Constitutional Law: Commentary and Materials* (Thompson Reuters, 2<sup>nd</sup> ed, 2007) 172 and Leslie Zines, *The High Court and the Constitution* (Federation Press, 4<sup>th</sup> ed, 1997), 55 - refer to s 51(1) as having been 'clearly taken' from the United States *Constitution*.

<sup>67</sup> For those new to this area, examples from the Australian free speech cases include *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 and 143 (Mason CJ), 231, 235, 239 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 32 (Mason CJ), 79 (Deane and Toohey JJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130 (referring to the fact that the United States provision is broader, applying to speech generally not just political speech, 'but that circumstance is not a reason for concluding that the United States and European approaches are irrelevant and inappropriate to our situation' (Mason CJ Toohey and Gaudron JJ), and 130-136, Deane J (177, 182); *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ), 623 (McHugh J), 638-642 (Kirby J) ('in determining the scope of the constitutionally protected freedom of communication in Australia, it seems reasonable to take into consideration at least some of the matters mentioned in the United States decisions (641-642), and 'the influence of United States jurisprudence upon (Mason CJ's observations in *Australian Capital Television*, the fundamental implied freedom decision of the High Court) was obvious and was acknowledged' (645); *Coleman v Power* (2004) 220 CLR 1, 75 (Gummow and Hayne JJ) ('support for the construction we have given can be had from considering what had been said in the Supreme Court of the United States about the application of the First Amendment'), 99 (Kirby J, who earlier had expressed support for the use of international law doctrines in interpreting human rights generally (92-94)); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, [151] (Heydon J); *Monis v The Queen* (2013) 295 ALR 259, [27]-[28] (French CJ); *Wotton v Queensland* (2012) 246 CLR 1, 21 where Heydon J referred to the 'distinct but related field of First Amendment litigation'; and leading academic in this field Adrienne Stone: 'the influence of American constitutional jurisprudence and specifically *First Amendment* law in the High Court of Australia has never been more significant than in the most adventurous of its (the High Court's) decisions on the freedom of political communication': 'Freedom of Political



the American material by some of the judges recently in *Monis*,<sup>68</sup> it is not considered radical or controversial to consider First Amendment case law in determining the parameters of the implied freedom of political communication in Australia.

The United States court has recognised political communication as one of the most important categories of speech warranting *First Amendment* protection, and specifically connected freedom of speech with,

a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends ...<sup>69</sup>

The *Constitution* guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.<sup>70</sup>

A range of different types of laws with freedom of association implications has been considered by the United States Supreme Court.<sup>71</sup> On the occasions where such laws have been invalidated, sometimes this occurs because the legislation is seen to fail the void-for-vagueness test or the overbreadth test; sometimes the decision is explicitly based on the interference with freedom of association rights protected by the *Constitution*.

Perhaps the factual scenario closest to association freedoms was considered in *City of Chicago v Morales et al.*<sup>72</sup> There the Court considered laws giving police power to order a group loitering in a public place to disperse, if the officer reasonably believed the group were gang members.. Failure to disperse as ordered was a breach of the ordinance, punishable by a fine, jail time of up to six months, and/or community service. A majority of the court<sup>73</sup> declared the provisions to be unconstitutional on the 'void for vagueness' principle. The power could be applied in an arbitrary way,<sup>74</sup> citizens did not have proper notice of

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Communication, the *Constitution* and the Common Law' (1998) 26 *Federal Law Review* 219, 220.

<sup>68</sup> It might be suggested here that the current High Court is less likely to adopt United States case law in this field than previous High Courts were, and our civil protection may be the poorer for it.

<sup>69</sup> *Roberts v United States Jaycees* 468 US 609, 622 (1984).

<sup>70</sup> *Ibid* 618,

<sup>71</sup> A good summary of the issues is provided in Joel Berg 'The Troubled Constitutionality of Antigang Loitering Laws' (1994) 69 *Chicago-Kent Law Review* 461, in Jocelyn Santo, 'Down on the Corner: An Analysis of Gang-Related Anti-Loitering Laws' (2001) 22 *Cardozo Law Review* 269.

<sup>72</sup> 527 US 41(1999); Kim Strosnider, 'Anti-Gang Ordinances After *City of Chicago v Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law' (2002) 39 *American Criminal Law Review* 101.

<sup>73</sup> Rehnquist CJ Scalia and Thomas JJ dissenting.

<sup>74</sup> 527 US 41(1999), 58 (Stevens, Souter and Ginsburg JJ), 64-65 (O'Connor and Breyer JJ), 71 (Kennedy J).

what was forbidden and what was permitted,<sup>75</sup> and the law did not distinguish between innocent and sinister associations.<sup>76</sup>

The United States Supreme Court has struck down provisions banning or restricting members of particular organisations from employment in particular fields, particularly where there was no distinction drawn between active and passive members of the organisation, and no requirement that the person know of the association's aims or agree with them. An Act could be unconstitutionally overbroad if it 'literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it'.<sup>77</sup> The legislation in *Robel* was invalid there 'precisely because the statute sweeps indiscriminately across all types of association with communist-type groups, without regard to the quality and degree of membership'.<sup>78</sup>

In contrast, since freedom of speech and freedom of association rights are not absolute, narrowly drawn provisions justifiably interfering with such a right may be valid.<sup>79</sup> Specifically, there must be an act of individual culpability other than mere membership of the organisation, for example intent to commit violence or otherwise illegal acts:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be

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<sup>75</sup> Ibid 60 (Stevens, Souter and Ginsburg JJ).

<sup>76</sup> Ibid; Ibid 66 (O'Connor and Breyer JJ).

<sup>77</sup> *United States v Robel* 389 US 258, 265 (1967) (Warren CJ, with whom Black Douglas Stewart and Fortas JJ agreed; Harlan and White JJ dissenting, Brennan J concurred, Marshall J did not render a decision in the case). Similar findings were made in *Elfbrandt v Russell et al* 384 US 11 (1966) (provisions rendering state employees liable to prosecution and dismissal if they knowingly and wilfully become or remain a member of the Communist Party struck out in the absence of evidence the individual member intended to pursue aim of violently overthrowing the government), and *Keyishan v Board of Regents of the University of the State of New York* 385 US 589 (1967) (requirement that employees certify they had never been a member of the Communist Party or if they had, they had advised the University President, under threat of dismissal struck out as contrary to freedom of association rights). These sentiments were applied to the denial of recognition to a campus organisation by a University (held to violate First Amendment association rights (*Healy v James* 408 US 169 (1972) and used to overturn provisions criminalising participation in a Communist Party meeting (*De Jonge v Oregon* 299 US 353 (1937)).

<sup>78</sup> Ibid 262.

<sup>79</sup> For instance, a law interpreted to apply only to those individuals who were members of an organisation with aims to overthrow the government (such an organisation being illegal) and who were knowing and active supporters of the organisation's aims was held valid against First Amendment challenge: *Scales v United States* 367 US 203 (1961); criminal anarchy provisions were validated against a First Amendment challenge (*Gitlow v People of New York* 268 US 652 (1925)).

sufficiently substantial to satisfy the concept of personal guilt in order to withstand (constitutional) attack. Membership, without more, in an organisation engaged in illegal advocacy ... has not .. been recognised by this Court to be such a relationship.<sup>80</sup>

As Cole notes:

Due process ... forbids the imposition of guilt by association no matter how clear the notice and no matter how fair the hearing ... guilt must be personal in order to be consistent with due process. To punish A for the acts of B, without showing any connection between A and the illegal acts of B other than A's general connection to B, is fundamentally unfair. It is to punish a moral innocent. The specific intent requirement that the Court read into the (Act considered in *Scales*) and which it has subsequently held must be satisfied whenever the government seeks to penalize an individual for the acts of his associates, responds to the substantive due process problem by tying the imposition of guilt to an individually culpable act.<sup>81</sup>

In another line of cases with some relevance to the current discussion, the United States Supreme Court has stated that criminal penalties may only be imposed where the defendant has committed some *actus reus*.<sup>82</sup> This doctrine has been subsequently used to strike out ordinances, for instance, making it a crime for known drunks, drug addicts, prostitutes, pimps and convicted felons to congregate together in public or to loiter in places serving alcohol. The federal district court struck out the ordinance on the basis of a lack of *actus reus*; congregating and loitering did not qualify.<sup>83</sup>

The Supreme Court has expressly noted that the associations protected by the First Amendment are not limited to political parties or those with expressly political motivations:

We have protected forms of association that are not political in the customary sense but pertain to the social, legal and economic benefit of the members.<sup>84</sup>

The Court has frowned on requirements that advocacy-based organisations be registered in a specific region prior to conducting their affairs. For instance, in *National Association for the Advancement of*

<sup>80</sup> *Scales v United States* 367 US 203, 224-225 (1961).

<sup>81</sup> David Cole, 'Hanging With the Wrong Crowd: Of Gangs, Terrorists and the Right of Association' (1999) *Supreme Court Review* 203, 217.

<sup>82</sup> *Robinson v California* 370 US 660, reh'g denied 371 US 905 (1962); *Powell v Texas* 392 US 514, 533 (1968).

<sup>83</sup> *Farber v Rochford* 407 F. Supp. 529, 533 (N.D Ill. 1975). An anti-loitering statute was struck out for similar reasons, as well as vagueness, in *Papachristou v City of Jacksonville* 405 US 156 (1972).

<sup>84</sup> *Griswold v Connecticut* 381 US 479, 483 (1965); *NAACP v Button* 371 US 415 (1962); *Schwartz v Board of Examiners* 353 US 232 (1957); William Douglas, 'The Right of Association' (1963) 63 *Columbia Law Review* 1361.

*Colored People v Alabama ex rel Patterson*,<sup>85</sup> Attorney-General the NAACP opened an office in Alabama without complying with local registration requirements. The State complained that the NAACP's activities were causing irreparable damage to the State and sought to enjoin their continued activities. The Court invalidated the state requirement on the basis there was inadequate justification for the infringement of the appellants' right to associate:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association ... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by ... freedom of speech ... Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.<sup>86</sup>

Subsequently, the Court articulated<sup>87</sup> two distinct aspects of the freedom of association for which the *Constitution* provides – (a) choices to enter into and maintain intimate human relationships, and (b) a right to associate for the purposes of *First Amendment* activity, including speech, assembly, petition for the address of grievances, religion etc. In relation to (b), the organisation need not be formed solely or mainly to engage in 'expressive activity' in order for that limb to be enlivened.<sup>88</sup>

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<sup>85</sup> 357 US 449 (1958).

<sup>86</sup> Ibid 460-461; these sentiments are also reflected in cases where the organisation does not have a clear advocacy agenda, for example the Court has confirmed that members of a motorcycle club have a right to associate with one another protected by the First Amendment: *United States v Rubio* 727 F. 2d 786, 791 (United States Court of Appeals, 9<sup>th</sup> Circuit) (1983). Similarly, a requirement that a labour organiser register before speaking with would-be members violates the First Amendment (*Thomas v Collins, Sheriff* 323 US 516 (1945)), as does a requirement that an organisation disclose its membership (*Louisiana ex rel Gremillion, Attorney-General et al v National Association for the Advancement of Colored People et al* 366 US 293 (1961)).

<sup>87</sup> *Roberts, Acting Commissioner, Minnesota Department of Human Rights et al v United States Jaycees* 468 US 609 (1984), followed in *City of Dallas v Stanglin* 490 US 19 (1989). Some argue that these two sub-categories are unduly restrictive and don't reflect all of the jurisprudence: David Cole, 'Hanging With the Wrong Crowd: Of Gangs, Terrorists and the Right of Association' (1999) *Supreme Court Review* 203, 225: 'the Court's early right of association decisions make clear that the constitutional right of association cannot be limited, as the Court's most recent decisions suggest, to expressive and intimate association. The right extends to all associations, including the non-expressive and the non-intimate, at least as much as it forbids the imposition of disabilities on individuals merely because of their ties to a group, absent proof of specific intent to further some illegal activity'.

<sup>88</sup> The Supreme Court applied it in *Boy Scouts of America and Monmouth Council et al v James Dale* 530 US 640 (2000) to allow the Boy Scouts to exclude an openly homosexual scoutmaster; a majority of the Court found that to force the Boy Scouts to keep Dale as a scoutmaster would unacceptably infringe their right to expressive association.

### C Europe

Freedom of association and peaceful assembly is protected by art 11 of the *European Convention on Human Rights*,<sup>89</sup> and freedom of expression, including the right to receive and impart information from/to others, protected by art 10.<sup>90</sup> Notably again, the rights are not absolute, and legislative incursion on such rights may be valid, where they are narrowly drawn or ‘necessary in a *democratic*’<sup>91</sup> society’. Again, one sees the balancing of competing interests at work in the jurisprudence of this jurisdiction; again, it is worth considering this jurisprudence, in establishing the proper balance in Australia, were the High Court to acknowledge the existence of an implied freedom of association.

Some of the contexts in which art 11 have been enlivened have included dealing with protesters. It has been found to be a breach of art 11, for instance, for police to arrest would-be protesters who police fear will resort to violence. The arrest response was held to be a disproportionate one to the achievement of the legitimate end of peace, and less drastic steps than that in fact taken were available.<sup>92</sup> Criminalisation of membership of banned organisations has sometimes survived an art 11 challenge.<sup>93</sup>

A key contentious issue has been whether the freedom of association contemplated by art 11 is confined to associations that are political in nature, or is to be interpreted more broadly. The Article itself does not clarify this, merely mentioning membership of a trade union as one example of the right. This example might suggest that the right is not intended to be limited to political associations, since trade unions are not

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<sup>89</sup> This is subject to limits prescribed by law and necessary in a democratic society in the interests of national security, public safety, prevention of disorder or crime, protection of morals or for the rights and freedoms of others; see also art 21 and 22 of the *International Covenant on Civil and Political Rights*.

<sup>90</sup> This is subject to similar limits as those referred to in the previous footnote; see also art 19(2) of the *International Covenant on Civil and Political Rights*.

<sup>91</sup> This is considered particularly important in the current context; as will be recalled some members of the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ) and 210 (Gaudron J) related the implied freedom of political communication to ‘representative democracy’.

<sup>92</sup> *R v Chief Constable of Gloucestershire* [2006] UKHL 55; see also *Schwabe and M.G v Germany* [2011] ECHR 1986 and *Galstyan v Armenia* [2007] ECHR 936.

<sup>93</sup> *Aydin v Germany* [2011] ECHR 141; in contrast, a temporary ban on the activities of an organisation was held to be inconsistent with Art 11 in *Christian Democrat People’s Party v Moldova* [2006] ECHR 132; a refusal to register a political party was similarly held in *Tsonev v Bulgaria* [2006] ECHR 423, dissolution of a minority party (based on an allegation it was involved in terrorist activity) invalidated due to lack of evidence of that allegation (*Hadev v Turkey* [2010] ECHR 2027); refusal to register a religious organisation was similarly held invalid in *Kimlya v Russia* [2009] ECHR 1424.

necessarily political actors. There was a suggestion in an earlier case that the right not be interpreted to include merely social gatherings.<sup>94</sup>

However a broader view has become evident. Baroness Hale thought in *R v Her Majesty's Attorney General* that the right of association could be applied to fox hunters, clearly not a political association<sup>95</sup>, and on the appeal against that House of Lords decision, the European Court favoured a broader view:

It would, in the Court's view, be an unacceptably narrow interpretation of (art 11) to confine it only to that kind of assembly (referring to peaceful demonstration and participation in the democratic process), just as it would be too narrow an interpretation of art 10 to restrict it to expressions of opinion of a political character ... the Court is therefore prepared to assume that art 11 may extend to the protection of an assembly of an essentially social character.<sup>96</sup>

In summary, the jurisprudence from the United States and Europe reiterates the fundamental nature of the freedom of association, connect it closely with freedom of communication, cast doubt on any supposed coherent distinction between communication/association that is political and that which is not, and acknowledge the possible acceptability of limits on freedom of communication/association, but only where a clear distinction appears between innocent associations and those of a sinister nature, to avoid 'guilt by association'. I turn now to consider an example of laws which interfere substantially with the freedom of association, consorting laws. The recently reworked New South Wales provisions are the prime example.

#### IV OUTLINE OF CURRENT CONSORTING PROVISIONS

The current New South Wales version of the offence is contained in the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW),

<sup>94</sup> *Anderson v United Kingdom* [1997] ECHR 150; there the court acknowledged that the right applied to private and publicly held meetings, but considered whether the applicants in that case had any history of organised assembly or association, as apparently opposed to 'purely social purposes'; see also *R v Her Majesty's Attorney-General and Another* [2007] UKHL 52, [58] (Lord Hope).

<sup>95</sup> [2007] UKHL 52, [118].

<sup>96</sup> *Friend v United Kingdom* [2009] ECHR 2068, [50] (all members of the Court). Consistent with the European position, the Supreme Court in Canada has agreed that freedom of association is not limited to political associations, and extends to associations of a religious, social or economic nature: Le Dain, Beetz and La Forest JJ in *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 S.C.R. 313, Le Dain, Beetz and La Forest JJ [142], Dickson CJ and Wilson J [85-86]: 'I am unable to regard (freedom of association) as embodying purely political freedoms ... (its) purpose is .. to recognise the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends'.

which amended the *Crimes Act 1900* (NSW) by inserting a new Division 7 in Part 3A of the Act. Consorting is defined to mean ‘consorting’ in person or any other means, including electronically.<sup>97</sup> The offence provision is s 93X, stating that a person who habitually consorts with convicted offenders,<sup>98</sup> and consorts with them after having been given an official warning<sup>99</sup> in relation to each of those offenders, is guilty of an offence.<sup>100</sup> Habitually consorting with convicted offenders is defined to mean that the person consorts with at least two convicted offenders (either at the same time or on separate occasions), and consorts with each on at least two occasions. A defence is available if the person can prove that they consorting in which they were involved related to seeing family members, or was for other legitimate reasons like business, education or training, to obtain health services, legal advice, or pursuant to a court order. However, such consorting must be ‘reasonable’ in order for the defence to apply.<sup>101</sup> The maximum penalty for committing the offence is three years’ imprisonment, up to 150 penalty units, or both.

Other jurisdictions have criminal provisions relating to consorting. This includes Victoria, where the offence extends to associating with someone who is merely suspected, not convicted, of committing a particular kind of offence.<sup>102</sup> The Western Australia provisions relate to declared (convicted) drug traffickers consorting with other declared drug

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<sup>97</sup> *Crimes Act 1900* (NSW) s 93W.

<sup>98</sup> A convicted offender is someone who has been convicted of an indictable offence: s 93W.

<sup>99</sup> This warning can be given verbally or in writing by a police officer, and is to the effect that the person with whom the person warned is consorting is a convicted offender, and that consorting with a convicted person is an offence (s 93X(3)). The lack of criteria upon which the police officer decides whether or not to issue the warning triggers consideration of the *Communist Party* case (*Australian Communist Party v Commonwealth*) (1951) 83 CLR 1 where the Court found legislation invalid partly due to the lack of criteria for the exercise of discretion provided to a member of the executive in declaring an organisation (association) to be prejudicial to the war effort. However, this was a federal law and the law was declared invalid because it was not supported by a head of power, namely the defence power. As a result, care must be taken not to read the case as a grand assertion of freedom of association rights, as noted by esteemed constitutional lawyer George Winterton in ‘The Significance of the *Communist Party* Case’ (1992) 18(3) *Melbourne University Law Review* 630, 657; Winterton quotes Fullagar J in the case to the effect that the law impugned in the *Communist Party* case would have been valid if passed by a state (262, *Communist Party* case).

<sup>100</sup> I will use the phrase ‘warned off’ in the remainder of this article to refer to this requirement.

<sup>101</sup> *Crimes Act 1900* (NSW) s 93Y.

<sup>102</sup> *Summary Offences Act 1966* (Vic) s 49F where the other with whom the person is consorting has been found guilty of, or is reasonably suspected of having committed, an organised crime offence. The South Australian provision is very similar, including consorting with a person merely suspected of criminal activity, and confining the application of the law to those convicted of or suspected of ‘serious and organised’ crime (s 13 *Summary Offences Act 1953* (SA)).

traffickers after being warned not to do so.<sup>103</sup> The Tasmanian provisions criminalise consorting with 'reputed thieves' unless the person can show they had lawful means of support and had good reasons for consorting with the others.<sup>104</sup> The Northern Territory provisions criminalise habitually consorting with 'reputed criminals'.<sup>105</sup> In October 2013 the Queensland Government moved against so-called 'criminal organisations', declaring twenty-six motorcycle clubs to be such organisations. New s 60A of the *Criminal Code 1899* (Qld) now makes it an offence for a participant<sup>106</sup> in a criminal organisation being knowingly present in a public place with two or more other participants. An offence against this section is punishable by a minimum of six months' jail (to be wholly served in a correctional facility), and a maximum of three years' jail.<sup>107</sup>

Perhaps the most noteworthy aspect of these various regimes is that they do not require any evidence that the purpose of the 'consorting' have any sinister overtones. With the exception of the Western Australian provision, the only 'wrong' that the person guilty of this offence need have committed is to 'consort' with a person or persons who have a criminal record or in some cases someone suspected of criminal behaviour, in some cases after having been 'warned off' by police, in some cases not, or in the case of the new Queensland laws, associate with other members of a banned organisation. The 'consorting' may be for entirely benign purposes;<sup>108</sup> despite the existence of defences in some of the Acts, this may not preclude the conduct being considered criminal. The idea of criminalising this type of behaviour is not new, having links

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<sup>103</sup> *Criminal Code Act 1913* (WA) s 557J.

<sup>104</sup> *Police Offences Act 1935* (Tas) s 6.

<sup>105</sup> *Summary Offences Act* (NT) s 56(1)

<sup>106</sup> A participant is someone who by words or conduct asserts, declares or advertises their membership of an association, seeks to be a member, attends more than one meeting of those who participate in the affairs of the association, or someone who takes part in the affairs of the organisation in another way. Lawyers acting in a professional capacity are not considered participants.

<sup>107</sup> It is a defence to show that the criminal organisation is not one whose participants have as their purpose, or one of their purposes, engaging in or conspiring to engage in criminal activity.

<sup>108</sup> The New South Wales provisions provided a 'defence' for some kinds of benign associations, including family associations, employment or training related associations etc, but not other kinds of benign associations, for instance an association between friends, an association among neighbours, members of a social or community group etc (s 93Y); Victoria recognises a 'reasonable excuse' defence (s 49F(2)), Western Australia provides for a defence if the accused would otherwise commit the offence with respect to associating with their partner, defacto child or lineal relative (s 557J(3)); Tasmania provides a 'good reasons' defence (s 6(2)), and South Australia requires the consorting occur 'without reasonable excuse' in order for the offence to be committed (s 13).



with old provisions criminalising vagrancy and loitering.<sup>109</sup> The fact that such laws may be selectively applied by police for other purposes has been noted by other scholars.<sup>110</sup>

## V APPLICATION OF THE IMPLIED FREEDOM OF ASSOCIATION TO CONSORTING LAWS

Assuming that the High Court of Australia would today find an implied freedom of association in the *Constitution*, at least for political purposes, how would such a freedom apply to consorting laws? I will use the New South Wales laws as the prime example, but many of the comments are applicable to consorting laws generally. I will draw attention to differences in the various Acts in the following discussion, where appropriate. A key distinction is that some jurisdictions recognise something of a ‘reasonable excuse’ defence to the application of these laws,<sup>111</sup> whilst others do not.<sup>112</sup> This application will serve to highlight possible deficiencies of the law regarding political association as it currently stands, allowing me to suggest future development of the jurisprudence in this area.

### A *None of the consorting provisions contain an exception relating to association for purely political purposes*

Of all of the current consorting provisions discussed above, it is noteworthy that none of them contain an express defence pertaining to the discussion of political matters. Yet, conflict between the objectives of the Act and the freedom of political association or communication can be readily conjured. Assume that I am a member of a political party, and wish to attend a branch meeting. As it happens, two other members of the branch have a criminal record. If, having been ‘warned off’ by the police in respect of consorting with those two individuals, I do so again by attending another party branch meeting together with those individuals, I would literally be in breach of the consorting laws. None of the legislated New South Wales defences would apply.<sup>113</sup>

<sup>109</sup> For instance, Stephen notes a 1744 British vagrancy statute referring to ‘idle and disorderly persons’, ‘rogues and vagabonds’ and ‘incorrigible rogues’ (*A History of the Criminal Law of England* (1882) 273; Mark Malone, ‘Homelessness in a Modern Urban Setting’ (1982) 10 *Fordham Urban Law Journal* 749.

<sup>110</sup> Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26 *University of New South Wales Law Journal* 567; see also Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37(1) *Melbourne University Law Review* 1.

<sup>111</sup> Victoria, Tasmania and South Australia.

<sup>112</sup> New South Wales, Western Australia, and the Northern Territory. (Western Australia is included within this group because its defence is limited to associations amongst family members).

<sup>113</sup> With respect to the Victorian, Tasmanian and South Australian provisions, it is possible to argue that this association would be for ‘good reason’, and within an exception to the

The consorting law applied in this context would, in the author's view, fall foul of the first *Lange* limb – the purpose of the meeting is to discuss political issues, members associate for that purpose, and the law burdens the freedom to communicate (and associate) about political matters. The second limb is typically more contentious – whether the burden is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with representative and responsible government. The author suggests it would be difficult to satisfy this test if the law effectively banned members of a political party from congregating to discuss political matters. It is submitted to be very likely that the law, at least as applied in this context, would be struck out, or read down.

I would acknowledge here, for the purposes of argument that preventing criminal activity is a legitimate end. However, to ban associations that might happen to involve people with a past criminal record is not considered to be reasonably appropriate and adapted to achieving this end. If the assumption behind such a law is that a person with a past criminal record is probably congregating for the purpose of committing further crime, such an assumption is contrary to our system of criminal justice. In reaching this conclusion, support is drawn from authorities in the United States and Europe to which reference was made earlier, authorities confirming that guilt by association alone is not consistent with *First Amendment* rights,<sup>114</sup> and that arresting someone merely because you think they might commit crime in future is contrary to association rights.<sup>115</sup>

Hence, at the very least, it is submitted these consorting laws need to be read down to accommodate the implied freedom of association in respect of a meeting of a political party. However, in many cases the situation is more complex.

#### B *Where an Association Involves a Mixture of Political and Social Ends*

The High Court in its dicta comments on freedom of association has often sought to limit the right so that it applies strictly to *political* associations. In the contexts in which the argument about the implied freedom has arisen, political associations have often been involved, so the issue of an association for a mixture of political/non-political purposes has not had to be squarely addressed. Some judges have insisted that the freedom of

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offence. If these provisions were read in this manner, they would be less likely to be found constitutionally invalid. This would not be possible in New South Wales (as indicated), Western Australia or the Northern Territory.

<sup>114</sup> *United States v Robel* 389 US 258 (1967); *City of Chicago v Morales* 527 US 41 (1999)

<sup>115</sup> *R v Chief Constable of Gloucestershire* [2006] UKHL 55; see also *Schwabe and M.G v Germany* [2011] ECHR 1986 and *Galstyan v Armenia* [2007] ECHR 936.

association is a corollary to the implied freedom of political communication, and is similarly limited. Two judges in *Australian Capital Television Pty Ltd* hinted that, at least over time, the freedom might be broadened beyond the mere 'political'.<sup>116</sup> This issue was also canvassed by one of the judges in *Attorney-General (SA) v Corporation of the City of Adelaide*.<sup>117</sup> The author submits that the distinction between purely political association, and non-political association, is sometimes not so easily drawn. It is submitted to be impractical in many cases to assume a strict division between the types of association.<sup>118</sup>

For example, let us continue with the scenario where I attend meetings of a political party. Assume my argument above is accepted that the consorting provisions as applied to this meeting could infringe the implied freedom of political communication because the gathering is for political purposes. Of course, people often congregate for a range of purposes, and no doubt even at a meeting of a political party, talk will turn to matters that are not political. One member may ask another member how their family is, or talk might turn to sport.

It is impractical to have a law that would operate in such a way that while the focus of the meeting was on political issues, that part of the meeting attracted the constitutional defence, but as soon as talk turned to non-political matters, police could begin arresting participants for consorting (obviously, if they met the requirements, such as some of the participants having a criminal record, and an individual having been warned off associating with them, but disregarding such warning). How would this be enforced? Police would have to attend at or eavesdrop on the meeting. Is it sensible to suppose they would step in depending on the direction of each conversation? Similar problems would arise in policing the consorting laws in respect of the fabled over-the-fence conversations with neighbours, where my neighbour happens to have a criminal record, and police have given me the appropriate warning. Is the conversation protected while talk is confined to the recent Australian election, America's economic recovery or the future of Europe, but not protected

<sup>116</sup> (1992) 177 CLR 106, 138: 'indispensable to (politicians') accountability and that responsibility (to the people) is freedom of communication, *at least* in relation to public affairs and political discussion' (Mason CJ) (emphasis added); 212: 'the notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, freedom of association, and perhaps, freedom of speech generally' (Gaudron J) (ie speech, and perhaps association, not confined to that which was 'political').

<sup>117</sup> (2013) 295 ALR 197, where Hayne J said that because the impugned provisions limited political and other communications, they effectively burdened freedom of communication about political matters: [133].

<sup>118</sup> A very broad view of what is 'political' here was taken by French CJ in *Hogan v Hinch* (2011) 243 CLR 506, where he claimed that it arguably included social and economic features of Australian society, because they were matters at least potentially within the purview of government: [49].

when it turns to the football or netball? The legal argument is that while the distinction between what is 'political' and what is 'non-political' has been relatively easy to make in the context of communication that has been on the public record, it is much more difficult to apply it in the context of association. For the author, this calls into question whether the Australian law in this area should evolve in a manner that relaxes the current requirement that the protected communication (association) have the required 'political' character.

Support for the argument that the freedom of association cannot realistically be limited to purely 'political' associations exists at international level. The American cases have confirmed now that associations that might be social in nature are protected,<sup>119</sup> as has the European Court of Human Rights in a recent decision.<sup>120</sup> In the experience of both of these jurisdictions, rights were originally limited to associations that were political in nature. Eventually, the move was taken to broaden the right beyond that horizon. In part, this reflects the theoretical understanding of the value to society and to each person individually of having the ability to associate with others of their choice, for a range of reasons.

Kirk has made a similar point:

If the constitutional freedom were limited to protecting groups formed primarily for political purposes it would protect political parties but little else. The justifications for free associations ... would extend the freedom to groups beyond political parties. Therefore the better view is that a right to form or join any association with even potentially political aims should be recognised.<sup>121</sup>

In the author's view, it also reflects the impracticality of laws that depend for their enforcement on whether a conversation meets the definition of being 'political', or not. Some Australian judges have themselves alluded to difficulties in distinguishing between what is 'political' and what is not. Freedom of association, for political and non-political ends, is protected in the great democracy of the United States, and is seen as fundamental to those adherents to the *European Convention on Human Rights*, with departures being exceptional and *necessary in a democratic society*. We don't, or should not have, a second-class democracy in

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<sup>119</sup> *Griswold v Connecticut* 381 US 479 (1965), *Roberts v United States Jaycees* 468 US 609 (1984).

<sup>120</sup> *Friend v United Kingdom* [2009] ECHR 2068.

<sup>121</sup> Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 56. It is conceded that Kirk did not advocate that the distinction between 'political' and 'non-political' speech be abandoned altogether, rather that a broad definition be applied to the word 'political'.

Australia, with limited rights based on distinctions that are both impractical and unreflective of the theoretical basis of the right.

While no member of the High Court has yet accepted the argument about the impracticability of neatly separating communication or association that is ‘political’ and that which is not, the Chief Justice recently defined ‘political’ communication in such a way that might lead, in time, to the abandonment of the distinction,<sup>122</sup> and another judge said that at as long as the law could apply to political communication, the *Lange* principles could be applied to it, despite the fact the law could apply to non-political communication as well.<sup>123</sup> These comments, and those made above, suggest that the implied freedom of association could be infringed by the consorting laws, because consorting may involve a mixture of political and social ends (Hayne J), because the consorting involves discussing ‘social and economic features of Australian society’ (French CJ), or because it is not practically possible to police a strict distinction between political association and non-political association, and this has been recognised internationally (*Griswold v Connecticut*, *Friend v United Kingdom*, Kirk, current author).

*C The laws do not distinguish between innocent associations and sinister associations*

Some of the consorting laws don’t distinguish between associations that might be for entirely innocent purposes, and associations that might have sinister overtones. This statement is sensitive to the existence of defences in some of the jurisdictions studied, some of which provide for ‘reasonable excuse’ defences.<sup>124</sup> Concern with the lack of distinction between sinister associations and benign associations is again most pressing with respect to the New South Wales laws, which provides for very limited defences in s93Y such that many innocent associations would fall outside of the defences, the Northern Territory, where no exception is legislated, and in Western Australia, where the only defence relates to associations amongst family members.

<sup>122</sup> French CJ suggested recently in *Hogan v Hinch* (2011) 243 CLR 506, [49] that the political arguably includes social and economic features of Australian society, because they were matters at least potentially within the purview of government.

<sup>123</sup> Hayne J in *City of Adelaide* (2013) 295 ALR 197, [133].

<sup>124</sup> For example, s 49F(2) of the Victorian Act (defence of reasonable excuse), s 6(2) of the Tasmanian Act (good reasons defence), s 13 of the South Australian Act (the offence is defined so as to require the association occur ‘without reasonable excuse’), and a family member exception in Western Australia (s 557J(3)). There is no such defence in the Northern Territory. The defence legislated in New South Wales is more restrictive than ‘reasonable excuse’ (s 93Y). If the defence in Victoria, Tasmania and South Australia is read in such a way that a non-sinister reason for associating is sufficient to fall within the ‘reasonable excuse’ defence, they are less likely to be deemed unconstitutional, in the author’s view.

It is accepted that the right to associate is not an absolute right, and some restrictions may be justified. For instance, there is no constitutionally difficulty with criminalising conspiracy, where a number of offenders meet to plan criminal activity. There is a clear public interest in criminalising such activity, despite it interfering with an individual's right of association. Carefully drawn conspiracy offences would not infringe a constitutional right to association. However, these consorting provisions apply indiscriminately, regardless of the purpose of the association. There is American precedent to support the argument that criminalising association in the absence of evidence of sinister motives for the association is contrary to First Amendment rights.<sup>125</sup> Related jurisprudence has found it unacceptable to criminalise a person's status, rather than an act or omission.<sup>126</sup>

Some analogy may be drawn with the situation considered in the recent Australian High Court decision of *Roach v Electoral Commissioner*,<sup>127</sup> involving legislation denying the right to vote to a range of individuals in custody. A majority of the High Court found the legislation to be invalid in its application to those in custody for a short time, such as the appellant.<sup>128</sup> Central to this decision was consideration of what s 7 and s 24 of the *Constitution* required in terms of a representative government. In the majority, Gleeson CJ stated that the franchise was critical to representative government and lay at the heart of our concept of participation in the life of the community and citizenship. He found that any exclusions from the general right to vote would have to have a rational connection with a legitimate objective,<sup>129</sup> and that there the denial was arbitrary because it was not proportionate to a legitimate objective such that would justify the incursion on constitutional democratic rights.<sup>130</sup> Gummow Kirby and Crennan JJ agreed the denial of voting rights to some individuals such as the appellant was not reasonably appropriate and adapted to the maintenance of representative government,<sup>131</sup> noting the similarity of the test here with the second limb on the *Lange* test.<sup>132</sup>

<sup>125</sup> *City of Chicago v Morales* 527 US 41 (1999).

<sup>126</sup> I don't dwell here on an argument that there are some things that a government cannot criminalise, versus a positivistic argument that the government can criminalise anything it wishes, the very nature of what a criminal act is etc: see for example Stuart Green, 'Why It's A Crime To Tear the Tag Off a Mattress: Overcriminalisation and the Moral Content of Regulatory Offences' (1997) 46 *Emory Law Journal* 1533; John Muncie and Eugene McLaughlin *The Problem of Crime* (2001); *Robinson v California* 370 US 660 (1962).

<sup>127</sup> (2007) 233 CLR 162.

<sup>128</sup> Gleeson CJ Gummow Kirby and Crennan JJ, Hayne and Heydon JJ dissenting.

<sup>129</sup> *Ibid* 174.

<sup>130</sup> *Ibid* 182.

<sup>131</sup> *Ibid*. 202.

<sup>132</sup> See above n 11 for an outline of the test.

The analogy is that the freedom to associate is also a fundamental part of the system of representative government enshrined by the *Constitution*. If freedom of communication is necessary for functional representative government, freedom to association is also necessary. When people associate, they communicate. A freedom to communicate, without the freedom to associate, would be an impoverished freedom. There is no good reason for denying that freedom to communicate includes an association freedom. What high constitutional purpose is served by recognising freedom to communicate, but not the ability to associate in order to communicate? It is also fundamental to 'participation in the life of the community', in the words of Gleeson CJ in *Roach*.

As indicated above, there is a real practical benefit to recognising an implied freedom of association, quite separate from freedom of expression. According to existing High Court jurisprudence, a law which *indirectly* infringes freedom of political communication is easier to justify than one which does so *directly*. This can lead to perverse outcomes. For instance, consider a law which directly criminalises political association. According to existing principles, it is easier to justify, since it does not directly infringe political communication; it does so indirectly. Yet, surely such a law strikes at the heart of the representative and responsible government for which our *Constitution* provides. Recognition of freedom of political association as a fundamental principle of itself, related to but distinct from the implied freedom of political communication, would help. If that doctrine were recognised, a law which criminalised political association would be harder to justify, as a direct attack on the freedom, surely an improved position than existing doctrine where such a law would be easier to justify.

While freedom of association is not absolute, a rational connection needs to be shown between the incursion on the freedom and a legitimate objective, and arbitrariness avoided. The blanket denial of the franchise there was not acceptable, though a more narrowly drawn limit taking into account the seriousness of the offence for which the person incarcerated would have been valid. The High Court has recently re-confirmed the validity of proportionality analysis,<sup>133</sup> including the existence of less invasive means to achieve the legitimate objective,<sup>134</sup> in relation to the implied freedom, as noted above.

Similarly here, a narrowly drawn incursion on the freedom to associate, based on evidence the individuals are consorting for criminal purposes may be valid. On the other hand, to criminalise association between an individual and two other individuals who have a criminal record, after having been warned off by police, is arbitrary and disproportionate to the

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<sup>133</sup> *Monis v The Queen* (2013) 295 ALR 259, [282] (Crennan Kiefel and Bell JJ).

<sup>134</sup> *Ibid* [347].

attainment of the legitimate objective (similar to the outcomes in *Robel* and *Morales* in the United States). Arguably, so is criminalisation of (and mandatory imprisonment for) the mere act of associating with other members of an organisation declared by the Queensland Government, as appears in s 60A of the *Criminal Code 1899* (Qld). Less invasive means are possible to secure the legitimate objective (similar to the outcome in *Chief Constable of Gloucestershire* in the United Kingdom). For instance, an offence based on evidence that two individuals were in fact consorting to plan criminal activity would be valid.

## VI SUMMARY OF ARGUMENT

It may be useful to summarise the essence of the argument here:

- The High Court has repeatedly recognised an implied freedom of political communication based on the system of representative democracy for which the Constitution provides, and has found several laws to be invalid because they infringe that freedom in a way that is constitutionally offensive, having regard to the two-limbed *Lange* test.
- In these cases, several judges have acknowledged that the implied freedom of political communication includes the right to associate with others, at least for that purpose. It seems sensible that a freedom to communicate should encompass a right to associate, since communication often takes place during association. However, these comments are strictly obiter dicta; recognition of freedom of association has not yet been the basis of any High Court decision.
- The High Court has dealt with legislation that is colloquially referred to as anti-association legislation, but those cases have been decided on other grounds. The Court did not find it necessary to consider the question of a constitutional freedom of association in those cases.
- On first principles, theoretical writings regarding the rationale for and community benefits of freedom of speech tend to provide support for a freedom to associate as a necessary aspect of free speech. Such writings make no distinction between speech that is 'political' and speech that is 'non-political'.
- United States First Amendment case law is highly relevant. Many of the Australian cases concerning the implied freedom of political communication, including the first case in which it was recognised in Australia, refer to the United States case law.



United States case law confirms that laws that literally create 'guilt by association' are constitutionally unacceptable.

- United States jurisprudence confirms that while association rights are not absolute, strong justification is required in order for laws impacting on such rights to be constitutionally acceptable. Specifically, proof of intent to commit an unlawful act is required. Blanket bans that take no account of the nature of a person's actual involvement in an association have not been accepted.
- European case law is similar, confirming that it is not consistent with the European Convention to arrest someone because of a fear they will commit violence. Past limiting of freedom of association to meetings that are 'political' in nature have been recently relaxed.
- Applying this to the example of the current New South Wales consorting laws, firstly they make no exception for association that is purely for political purposes. This fact alone makes the laws highly vulnerable to constitutional challenge. The same can be said for the Western Australia and Northern Territory versions. With respect to the Victorian, South Australian and Tasmanian provisions, these laws don't provide an exception for association for political purposes expressly, but do recognise something of a 'reasonable excuse' defence, which might be interpreted to include association for political purposes.
- The context of the consorting laws highlight a problem with the jurisprudence in this area that has been obscured previously. In past cases, it has usually been clear that the party affected was involved in communication that was 'political'. What was said was in the public domain. The assumption underlying this aspect of the *Lange* test, that it is possible and desirable to neatly divide communication which is 'political' and communication which is not 'political', is more difficult in the sphere of association, where the likelihood is that association occurs for a range of purposes, only some of which are political. The test can break down given the practical difficulty of separating occasions where an association is for political purposes, and when it is for non-political purposes. This suggests that the current requirement, for the application of the implied freedom, that the communication be for 'political' purposes may require revisiting. This has occurred in Europe, and the requirement has been relaxed.
- The New South Wales laws, together with the Western Australian and Northern Territory laws, make insufficient distinction between associations that are for innocent purposes,

and those that are for illicit purposes. Indiscriminatory laws of that nature have been found to be constitutionally unacceptable in the United States. A more tailored law might pass constitutional muster. This nuanced, non-absolutist view of freedom of communication is reasonably consistent with the second limb of the *Lange* test in Australia, and the Australian High Court should similarly find these laws objectionable for this reason.

## VII CONCLUSION

Although some members of the High Court have expressed in two different lines of cases support for the existence of an implied freedom of political association, it has not yet formed the basis of any actual decision. It has been able to decide these cases on the (related) implied freedom of political communication, and the *Kable* principle. As a result, confirmation by a majority of the High Court on the existence of an implied freedom of association, at least for political purposes, is currently lacking.

This paper has sought to re-assert the fundamental nature of such a right in a democracy such as Australia. It has drawn on theoretical writing reflecting the essentiality of such a freedom, and outlined how such freedoms have been upheld in comparable jurisdictions such as the United States and Europe. This wisdom raises several issues which the High Court will need to confront if it does accept freedom of association, including the continued viability of the current distinction between communication and association that is 'political', and communication and association that is not political. This distinction has not proven to be viable or useful elsewhere, and should be discarded here. This resolution will also have implications for the current doctrine of the implied freedom of 'political' communication. In the balancing required by the *Lange* test, the High Court would also need to consider the constitutional validity of laws implicating association which do not distinguish between association for proven sinister purposes, and association which may be for benign purposes, in terms of its proportionality and less drastic means principles as applied in the second limb of the *Lange* test.

The paper has used consorting laws as the prime example of current laws that impact on the freedom of association. The High Court should accept the implied freedom of association, and then consider whether consorting laws are constitutionally invalid. Assuming that a similar version of the two-stage *Lange* test applied to freedom of communication would apply to freedom of association, these laws clearly have the potential to burden association that is 'political', , in relation to the first *Lange* limb. In considering the second limb, given the breadth of these laws, it is

concluded they may not be seen to be reasonably appropriate and adapted to the fulfilment of a legitimate objective in a manner consistent with representative and responsible government. The risk of a successful constitutional challenge is considered greatest with respect to the New South Wales, Western Australian and Northern Territory provisions. None of these laws provide a defence (directly or indirectly) to associations that are for purely political purposes, to take the narrowest view of the freedom. They are disproportionate in their impact and fail the less drastic means test, because they don't distinguish between associations that may be for purely legitimate reasons, and associations with sinister overtones.